87-309

No.____

Supreme Court, U.S.
FILED
AUG 24 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1987

MADELINE RITTER,

Petitioner,

v.

MOUNT ST. MARY'S COLLEGE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Dona S. Kahn, Esquire
Alison Pease, Esquire*
Attorneys for Petitioner

Of Counsel:

HARRIS AND KAHN
1600 Market Street
Suite 1416
Philadelphia, Pennsylvania 19103
(215) 568-4202

**Attorney of Record*

PACKARD PRESS / LEGAL DIVISION, 10th & SPRING GARDEN STREETS, PHILA., PA. 19123 (215) 236-2000

QUESTIONS PRESENTED

1. After an appellate court has determined that legal claims, which were properly joined with an equitable claim, were erroneously dismissed, on remand may the district court, consistent with the Seventh Amendment of the United States Constitution, apply the doctrine of collateral estoppel or issue preclusion to bar further litigation of the legal issues before a jury?

2. May trial before a jury of an Equal Pay Act ("EPA") claim be precluded by factual findings made during an earlier bench trial of a Title VII claim when the issues presented by and standards of proof for the two claims are different and the judgment on the Title VII claim was based on the determination of two issues, only one of which was affirmed by the Court of Appeals?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	7
I. THE COURT SHOULD REVIEW THIS CASE TO RESOLVE THE INTERCIRCUIT CONFLICT REGARDING THE PROPER BALANCING OF A PARTY'S RIGHT TO A JURY TRIAL WITH CONCERNS FOR JUDICIAL EFFICIENCY	7
II. THE DECISION BELOW DENIED RIGHTS UNDER THE SEVENTH AMENDMENT AS THEY HAVE BEEN CONSTRUED BY THIS COURT	11
III. EVEN IF COLLATERAL ESTOPPEL WERE APPROPRIATE IN THIS CASE, THE COURT OF APPEALS ERRED IN APPLYING IT TO PETITIONER'S EQUAL PAY ACT CLAIM	13
CONCLUSION	15

TABLE OF CONTENTS—*(Continued)*

Page

APPENDIX

OPINION OF COURT OF APPEALS, April 2, 1987 ..... A-1

COURT OF APPEALS' ORDER DENYING PLAINTIFF'S PETITION FOR REHEARING, May 28, 1987 ..... A-16

OPINION AND ORDER OF DISTRICT COURT, September 3, 1985 ..... A-17

OPINION AND ORDER OF DISTRICT COURT, November 19, 1985 ..... A-27

NOTICE OF JUDGMENT, April 2, 1987 ..... A-35

TABLE OF AUTHORITIES

Cases: Page

Beacon Theatres, Inc. v. Westover, 359 U.S. 500 (1959) 7, 11, 12, 13

Bouchet v. The National Urban League, 730 F.2d 799 (D.C. Cir. 1984) 13

Calnetics Corporation v. Volkswagen of America, Inc., 532 F.2d 674 (9th Cir.), *cert. denied*, 429 U.S. 940 (1976) 10

Corning Glass Works v. Brennan, 417 U.S. 188 (1974) 15

County of Washington v. Gunther, 452 U.S. 161 (1981) 15

Curtis v. Loether, 415 U.S. 189 (1974) 9, 10, 11

Dairy Queen v. Wood, 369 U.S. 469 (1961) 11, 12

Heyman v. Kline, 456 F.2d 123 (2d Cir.), *cert. denied*, 409 U.S. 847 (1972) 10

Hussein v. Oshkosh Motor Truck Company, 816 F.2d 348 (7th Cir. 1987) 7, 8, 13

Marshak v. Tonetti, 813 F.2d 13 (1st Cir. 1987) .. 10

NLRB v. Catholic Bishops of Chicago, 440 U.S. 490 (1979) 5

Parklane Hosiery Company, Inc. v. Shore, 439 U.S. 322 (1979) 6, 8, 9, 12

Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981) 15

STATUTES

28 U.S.C. §451 3

28 U.S.C. §1254(1) 2, 3

28 U.S.C. §1343 3

TABLE OF AUTHORITIES—(*Continued*)

Statutes: Page

29 U.S.C. §206(d) ..... i, 2, 3, 5, 6, 9, 11, 14, 15

29 U.S.C. §621 *et seq.* 3, 4, 5, 6, 9, 11, 14

42 U.S.C. §1981 8

42 U.S.C. §2000e *et seq.* ..... i, 3, 5, 6, 8, 9, 10, 15

UNITED STATES CONSTITUTION

U.S. Const. amend. VII ..... i, 2, 8, 10, 11, 12

OTHER AUTHORITIES

Fed.R.Civ.P. 12(b)(1), (2) and (6) 4

Fed.R.Civ.P. 38 11

Fed.R.Civ.P. 54(b) 9

Fed.R.Civ.P. 60(b)(5) 6

Restatement (Second) of Judgments Section 27.. 9, 14

Restatement (Second) of Judgments Comment c to Section 27 14

Restatement (Second) of Judgments Comment o to Section 27 14

Restatement (Second) of Judgments Section 28(4). 15

18 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* §4417 (1981) 14

18 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* §4418 (1981) 9

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1987

No.

MADELINE RITTER,

Petitioner,

v.

MOUNT ST. MARY'S COLLEGE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner, Madeline Ritter, prays that a writ of certiorari be issued to review the April 2, 1987 judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 814 F.2d 986 (4th Cir. 1987). The petition for rehearing was denied on May 28, 1987. The relevant decisions of the district court have not been published.

JURISDICTION

The judgment of the Court of Appeals was entered on April 2, 1987. A timely petition for rehearing was

denied on May 28, 1987. This petition is being filed within 90 days of the denial of the petition for rehearing.

This Court has jurisdiction to review the judgment of the Court of Appeals under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the following constitutional provisions and statutes:

U.S. Constitution

The Seventh Amendment

> In Suits at Common Law, where the value in controversy shall exceed twenty dollars, the right of jury trial shall be preserved and no fact tried by a jury shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

Title 29, United States Code, Labor

§206 *Fair Labor Standards*

> (d)(1) No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex. . . .

§623 *Prohibition of Age Discrimination*

(a) It shall be unlawful for an employer—

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age. . . .

Title 42, *Public Health and Welfare*

§2000e-2. *Discrimination because of race, color, religion, sex, or national origin*

(a) It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin. . . .

STATEMENT OF THE CASE

On March 17, 1980, petitioner Madeline Ritter filed a complaint in the United States District Court for the District of Maryland, alleging that her former employer, respondent Mount St. Mary's College ("the College") had violated her rights as secured by Title VII of the Civil Rights Act of 1964, as amended ("Title VII"), 42 U.S.C. §2000e *et seq.*, the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §621 *et seq.*, and the Equal Pay Act of 1963 ("EPA"), 29 U.S.C. §206(d). The jurisdiction of the district court was invoked under Sections 451 and 1343 of Title 28 of the United States Code.

Plaintiff was employed as an assistant professor of education by the defendant College from 1973 until June, 1980. Shortly after she was hired, the chairperson

of her department became ill, and Professor Ritter assumed the responsibilities of chairperson and of being the only full-time teacher in the department. In addition to teaching almost all the courses offered by that department, she developed and instituted the College's first elementary education curriculum, and in 1977 participated in the certification of the department by the Maryland State Department of Education.

During the school term of 1978-1979, in the sixth year of working for the defendant, Professor Ritter was considered for tenure, as were four other faculty members. The College solicited comment from faculty, students, and administrators regarding those being considered. Over one hundred letters were received favoring the grant of tenure to Professor Ritter. She was the only one of the five unanimously recommended for tenure on the first ballot by the Faculty Affairs Committee, which had the responsibility of evaluating the candidates for tenure and in turn making a recommendation to the president of the College. Also, John Popenfus, who had taken over as chairperson of the Education Department, recommended Professor Ritter for tenure.

Nonetheless, the president of the College, Dr. Robert A. Wickenheiser, denied plaintiff tenure. An important reason for his decision was the fact that she did not have a "terminal degree," a doctorate. Professor Ritter appealed the denial of tenure to the Board of Trustees of the College, which affirmed Dr. Wickenheiser's decision. Professor Ritter then filed with the appropriate administrative agencies charges of sex and age discrimination and denial of equal pay.

On March 17, 1980, she filed the instant suit in federal district court. Defendant, on April 29, 1980, moved to dismiss the complaint under Rules 12(b)(1), (b)(2) and (b)(6) of the Federal Rules of Civil Procedure. Treating this motion as one for summary judgment, on August 8, 1980, the district court dismissed plaintiff's claims under the ADEA and the EPA. The district court

judge, relying upon the decision in *NLRB v. Catholic Bishops of Chicago*, 440 U.S. 490 (1979), held that the two causes of action could not be brought against a religious institution, such as the College.

Because these two claims were dismissed very early in the litigation, plaintiff did not conduct, at that time, discovery regarding her age or equal pay claims. All rulings made by the district court after the dismissal of the ADEA and EPA counts pertained only to her claim of sex discrimination under Title VII. Since there is not any right to a jury trial under Title VII, Professor Ritter did not oppose defendant's motion to strike the demand for a jury trial.

The district court judge, sitting as the trier of fact, conducted the trial of the Title VII claim, and on May 27, 1981 found in favor of the College. This decision rested on the factual findings that (1) Professor Ritter was not qualified for tenure and (2) John Popenfus, a male colleague in the Education Department who was tenured in 1979, was "clearly more qualified" for tenure than was plaintiff. The district court reached this conclusion even though plaintiff showed at trial that Popenfus had obtained his "Ph.D." at Holy Cross College, a two-year junior college. The district judge denied the College's petition for attorneys' fees, costs and expenses.

Professor Ritter and the College filed cross appeals to the United States Court of Appeals for the Fourth Circuit. She appealed the dismissal of her ADEA and EPA claims as well as the adverse judgment of her Title VII claim. The College appealed the denial of its motion for attorneys' fees.

The Fourth Circuit reversed the dismissal of the ADEA and EPA claims and remanded them for further consideration. Affirming the judgment against Professor Ritter on the Title VII claim, the Court of Appeals held that the trial judge's factual finding that she was not qualified for tenure was not clearly erroneous. The

appellate court also affirmed the denial of the defendant's request for attorneys' fees.

After remand of the case, the College moved for summary judgment on the ADEA and EPA claims, alleging that further litigation of these matters was barred by the doctrines of law of the case and collateral estoppel. Professor Ritter then filed, under Federal Rule of Civil Procedure 60(b)(5), a motion to vacate the judgment in favor of the respondent on the Title VII claim. She argued that, because the district court had erred in dismissing her legal claims, the judgment in favor of the College on the equitable claim, the Title VII count, must be vacated so that a jury could determine all factual issues common to both the legal and equitable claims.

On September 3, 1985, the district court granted judgment in favor of the College on the age discrimination case, holding that the factual findings in the Title VII suit precluded plaintiff from establishing a prima facie case of age discrimination. The court held also that it lacked authority to vacate the Title VII judgment since it had been affirmed by the court of appeals. On November 20, 1985, the court relied on collateral estoppel to enter summary judgment for the College on the EPA claim. The court held that its previous finding that Popenfus was more qualified than plaintiff provided the College with a statutory defense since the pay differential was based on ". . .[a] factor other than sex." 19 U.S.C. §206(d)(1)(iv).

Professor Ritter appealed the granting of summary judgment in favor of the College on the ADEA and EPA claims and the denial of her motion to vacate judgment in the Title VII action. Relying upon the decision in *Parklane Hosiery Company v. Shore*, 439 U.S. 322 (1979), the United States Court of Appeals for the Fourth Circuit affirmed the judgment of the district court, stating: ". . . the interests of the judicial system in

the prudent use of its limited resources permit the doctrine of collateral estoppel to operate to preclude relitigation of these issues before the jury" (A-2).

REASONS FOR GRANTING THE WRIT

Among the many important cases competing for this Court's attention, this case stands out in its significance to the administration of civil justice in the federal court system for the reasons that follow.

I. THE COURT SHOULD REVIEW THIS CASE TO RESOLVE THE INTERCIRCUIT CONFLICT REGARDING THE PROPER BALANCING OF A PARTY'S RIGHT TO A JURY TRIAL WITH CONCERNS FOR JUDICIAL EFFICIENCY

In affirming the grant of summary judgment in favor of defendant on plaintiff's legal claims, the Court of Appeals held that ". . . the judicial interest in the economical resolution of cases, which interest underlies the doctrine of collateral estoppel, does override the interest of the plaintiff in retrying before a jury the facts of a case determined by a court sitting in equity" (A-8).

This holding directly conflicts with that of the United States Court of Appeals for the Seventh Circuit in *Hussein v. Oshkosh Motor Truck Company*, 816 F.2d 348 (7th Cir. 1987). The Seventh Circuit wrote:

> We cannot sanction an application of collateral estoppel which would permit findings made by a court in an equitable proceeding to bar further litigation of the legal issue that has been properly joined with the equitable issue when those findings were made only because the district court erroneously dismissed the plaintiff's legal claim. To permit such an application would allow the district court to accomplish by error what *Beacon Theatres* otherwise prohibits it from doing.

Id. at 356-357.

The Court should grant review in order to resolve this direct conflict between two Courts of Appeals on the important question of what balance should be struck between a litigant's Seventh Amendment right to a jury trial and the concern of both courts and parties that litigation be resolved expeditiously. The analysis and holding regarding this issue by the Seventh Circuit in *Hussein, supra,* is correct while that by the Fourth Circuit in this case is not.

The facts of the *Hussein* case and of this case are very similar. Mr. Hussein, an Egyptian-born, naturalized United States citizen, sued his employer for race discrimination under Title VII and Section 1981 of the Civil Rights Act of 1866, 42 U.S.C. §1981. The district court dismissed his claim under Section 1981, holding that the statute protects only Black Americans. Because this dismissal removed from the litigation the only claim which entitled Hussein to a jury trial, his Title VII claim was decided by the district judge, who found in favor of the defendant.

On appeal, the Seventh Circuit held that the dismissal of the Section 1981 count was improper. The Court of Appeals was then required to determine whether the doctrine of collateral estoppel barred further litigation of those issues already resolved in the bench trial of the Title VII count, or whether the Seventh Amendment required the vacating of this judgment so that a jury could determine the factual issues common to both the Section 1981 and the Title VII claims. While the Seventh Circuit did not vacate the judgment in favor of defendant on the Title VII claim, it did remand the Section 1981 count with a clear mandate that a jury should determine the merits of that claim. In direct conflict with the analysis of the Fourth Circuit in the instant case, the *Hussein* decision held that *Parklane Hosiery Company, Inc. v. Shore*, 439 U.S. 322 (1979), did not control.

The Fourth Circuit erred in applying the holding in the *Parklane* decision to this case because the facts of the two cases are substantially different. The most crucial difference is that *Parklane* involved an earlier valid judgment in a prior suit.

Section 27 of the *Restatement (Second) of Judgments* describes the general rule for issue preclusion as:

> When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim.

The instant case does not involve a subsequent suit or "a subsequent action between parties." Rather, it presents a single case in which legal and equitable claims were properly joined, but the legal claims were erroneously dismissed by the trial court. Within a single suit, except where Federal Rule of Civil Procedure 54(b) applies, "preclusion is seldom appropriate." 18 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* §4418 at 176 (1981).

Moreover, the judgment of the district court on the Title VII count is not a valid judgment because it was based in part on the erroneous dismissal of the legal claims under the ADEA and the EPA. That is, absent the erroneous dismissal of plaintiff's legal claims, the trial judge, in deciding the Title VII claim, would have been bound by the factual findings of the jury on the ADEA and EPA counts. Given the circumstances of this case, *Parklane* does not require or even permit the defendant to preclude further litigation of legal claims which should not have been dismissed.

This Court's decision in *Curtis v. Loether*, 415 U.S. 189 (1974), is more relevant than is the *Parklane* decision. In the former case, a Black woman brought suit under Section 812 of Title VIII of the Civil Rights

Act of 1968, alleging that defendant refused to rent an apartment to her because of her race. The district court denied defendant's timely request for a jury trial on the basis that a jury trial was neither authorized by Title VIII nor required by the Seventh Amendment.

This holding was reversed by the Court of Appeals for the Seventh Circuit and affirmed by this Court. The matter was remanded for a new trial before a jury. In the instant case, the Fourth Circuit offered the following justification for its decision:

> . . . the litigants would conduct a trial to the bench, with the full knowledge that all could go for naught if any of the legal claims were reversed and a jury were entitled to determine the same facts on a clean slate. In this latter instance, the incentives of the litigants to litigate effectively would be diminished; moreover, needless time and expense would be undertaken. Thus the better rule, as enunciated in *Parklane*, is for judge-determined issues to stand as the facts of the case. One trial of common facts is enough. (A-9.)

All this could also be said of the circumstances of *Curtis v. Loether, supra*. It is no more reasonable to suggest in the instant case, than it would have been in *Curtis, supra*, that a new trial before a jury is not required because the parties already have had a full and fair opportunity to litigate the issues in a bench trial.

The decision of the Fourth Circuit in this case is also contrary to other Court of Appeals' decisions which hold that whenever a jury trial has been wrongfully deprived, for whatever reason, the judgment must be reversed and remanded for trial before a jury. *See Marshak v. Tonetti*, 813 F.2d 13, 16-17 (1st Cir. 1987); *Calnetics Corporation v. Volkswagen of America, Inc.*, 532 F.2d 674, 690 (9th Cir.), *cert. denied* 429 U.S. 940 (1976) and *Heyman v. Kline*, 456 F.2d 123, 129-130 (2d Cir.), *cert. denied*, 409 U.S. 847 (1972).

The *Hussein* decision, and not the decision of the Fourth Circuit in this case, strikes the correct balance between a party's Seventh Amendment right to a jury trial and the concern of the courts and of litigants in avoiding needless relitigation of matters which have already been resolved.

II. THE DECISION BELOW DENIED RIGHTS UNDER THE SEVENTH AMENDMENT AS THEY HAVE BEEN CONSTRUED BY THIS COURT

As the Court pointed out in *Curtis v. Loether, supra*, the Seventh Amendment applies "to actions enforcing statutory rights, and requires a jury trial upon demand, if the statute creates legal rights and remedies, enforceable in an action for damages in the ordinary courts of law." 415 U.S. at 194. In this case, it is undisputed that Professor Ritter had a right to a jury trial of her legal claims under the ADEA and the EPA and that she made a timely demand for one under Federal Rule of Civil Procedure 38. But for the error of the trial court, she would have been able to obtain a jury determination of the common facts underlying her discrimination claims.

The decision in this case runs counter to the policy concerns set forth in the Court's decisions in *Beacon Theatres v. Westover*, 359 U.S. 500 (1959) and *Dairy Queen v. Wood*, 369 U.S. 469, 473 (1961), which hold that, where legal and equitable claims are properly joined in a single case, as they were in the instant case, the legal claims should be tried first so as to preserve the right to a jury trial. These policy concerns were described as follows:

> . . . Since the right to jury trial is a constitutional one, however, while no similar requirement protects trials by the court, that discretion is very narrowly limited and must, wherever possible, be exercised to preserve jury trial.

* * *

> This long-standing principle of equity dictates that only under the most imperative circumstances, circumstances which in view of the flexible procedures of the Federal Rules we cannot now anticipate, can the right to a jury trial of legal issues be lost through prior determination of equitable claims.

Beacon Theatres, supra, 359 U.S. at 510-511.

The decision by the Fourth Circuit in this case also offends the strong federal policy favoring jury trials in civil matters, which is embodied in the Seventh Amendment. As Chief Justice Rehnquist wrote in his dissent to the *Parklane* decision, *supra*:

> The founders of our Nation considered the right of trial by jury in civil cases an important bulwark against tyranny and corruption, a safeguard too precious to be left to the whim of the sovereign, or, it might be added, to that of the judiciary. Those who passionately advocated the right to a civil jury trial did not do so because they considered the jury a familiar procedural device that should be continued; the concerns for the institution of jury trial that led to the passages of the Declaration of Independence and to the Seventh Amendment were not animated by a belief that use of juries would lead to more efficient judicial administration. Trial by a jury of laymen rather than by the sovereign's judges was important to the founders because juries represent the layman's common sense, the "passional elements in our nature," and thus keep the administration of law in accord with the wishes and feelings of the community.

439 U.S. at 343-344, quoting O. Holmes, Collected Legal Papers 237 (1920) (footnote omitted).

The holdings of *Beacon Theatres* and *Dairy Queen* not only bar the application of collateral estoppel in this case but require that the judgment in favor of defendant

on the Title VII count be reversed and remanded. The decision in *Bouchet v. The National Urban League*, 730 F.2d 799 (D.C. Cir. 1984) (Scalia, J.), presents the appropriate analysis. The complaint in *Bouchet* included a Title VII count as well as pendent state common law claims. The Court of Appeals noted that an erroneous dismissal of the legal claims and a consequent denial of a jury demand ". . . would infect the disposition of [her] Title VII claim as well, since most if not all of its elements would have been presented to the wrong trier of fact. . . ." *Id.* at 803-804. The *Bouchet* decision further noted that such error would require the vacating of any judgment in the Title VII matter so that the whole case could be retried, "giving preclusive effect to all the findings of fact by the jury." *Id.*

As the Seventh Circuit noted in *Hussein, supra*, the decision in this case allows the "district court to accomplish by error what *Beacon Theatres* otherwise prohibits it from doing." 816 F.2d at 356-357.

III. EVEN IF COLLATERAL ESTOPPEL WERE APPROPRIATE IN THIS CASE, THE COURT OF APPEALS ERRED IN APPLYING IT TO PETITIONER'S EQUAL PAY ACT CLAIM

The Fourth Circuit affirmed summary judgment in favor of defendant on the EPA claim on the basis that the earlier finding by the district court that Popenfus was "clearly more qualified" than plaintiff for tenure should be given collateral estoppel effect because it constituted a "factor other than sex," one of the four Equal Pay Act exemptions. The Fourth Circuit acknowledged, however, that the application of collateral estoppel or issue preclusion in this case was problematic since it had not affirmed, in the previous appeal in this case, the finding that Popenfus was clearly more qualified but had affirmed only the finding that Professor Ritter was not qualified for tenure. (A-13)

Comment o to Section 27 of the *Restatement (Second) of Judgments* describes the effect of an appeal on the general rule of issue preclusion:

> If a judgment rendered by a court of first instance is reversed by the appellate court and a final judgment is entered by the appellate court (or by the court of first instance in pursuance of the mandate of the appellate court), this latter judgment is conclusive between the parties.
>
> If the judgment of the court of first instance was based on a determination of two issues, either of which standing independently would be sufficient to support the result, and the appellate court upholds both of these determinations as sufficient, and accordingly affirms the judgment, the judgment is conclusive as to both determinations. . . .
>
> If the appellate court upholds one of these determinations as sufficient but not the other, and accordingly affirms the judgment, the judgment is conclusive as to the first determination. . . .

In the first appeal of this case, the Fourth Circuit affirmed the district court's ". . . factual finding that Mrs. Ritter lacked the scholarly attributes required by the College for ascension to a tenured position on the faculty." *Ritter v. Mount St. Mary's*, No. 81-1534, slip op. at 7 (4th Cir., June 8, 1984). Since the Court of Appeals did not affirm the finding that Popenfus was more qualified for tenure, when the ADEA and EPA claims were remanded, that factual determination could not be used as a basis for precluding a trial of petitioner's EPA action.

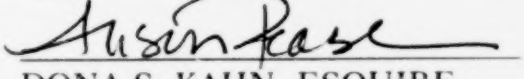
Collateral estoppel is appropriate "only when the same issue has been decided in one case and arises in another." 18 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* §4417 at 148 (1981). *See also Restatement (Second) of Judgments* §27, comment c. In

this case, the only issue decided by the district court in trial of the Title VII count was Professor Ritter's qualifications for tenure. That finding could not properly preclude litigation of the EPA claim because the EPA and Title VII claims have different elements and burdens of proof. *County of Washington v. Gunther*, 452 U.S. 161, 170 (1981). In a disparate treatment Title VII case, the burden to prove intentional discrimination always remains with the plaintiff. *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 256 (1981). By contrast, in an EPA suit, once plaintiff has established a *prima facie* case, the burden shifts to defendant to prove by a preponderance of the evidence that its conduct falls within one of the four statutory exemptions. *Corning Glass Works v. Brennan*, 417 U.S. 188, 195-197 (1974). Issue preclusion will not apply if the burden of persuasion has shifted from the party against whom preclusion is sought. *See* Section 28(4) of *Restatement (Second) of Judgments*.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,



DONA S. KAHN, ESQUIRE
ALISON PEASE, ESQUIRE*
Attorneys for Petitioner

OF COUNSEL:

HARRIS AND KAHN
1600 Market Street
Suite 1416
Philadelphia, PA 19103
(215) 568-4202

*Attorney of Record

APPENDIX

OPINION OF COURT OF APPEALS
April 2, 1987

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 86-3015

MADELINE RITTER,

Appellant,

v.

MOUNT ST. MARY'S COLLEGE,

Appellee.

Appeal from the United States District Court
for the District of Maryland, at Baltimore.
Edward S. Northrop, District Judge.
(C/A No. 80-632).

Argued: October 8, 1986 Decided: April 2, 1987

Before ERVIN, CHAPMAN, and WILKINS, Circuit Judges.

Carol E. Tracy (Dona S. Kahn; Harris and Kahn on brief) for appellant; Neil J. Dilloff (Jonathan D. Smith, Piper & Marbury on brief) for appellee.

CHAPMAN, Circuit Judge:

This suit alleging age and sex discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, *et seq.*, the Equal Pay Act of 1963 (EPA), 29 U.S.C. §206(d) and the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §621, *et seq.* involves both legal and equitable claims. The district court dismissed the plaintiff's legal claims under EPA and ADEA and conducted a bench trial on the equitable claim under

Title VII. This court remanded the case for trial on the legal claims, finding their dismissal to be error.[1] The question presented in this appeal is whether the findings of fact made by the trial judge in the Title VII equitable suit should collaterally estop the relitigation of those facts before a jury on the remanded EPA and ADEA legal actions. Although the plaintiff has been denied her right to a jury trial on the legal theories, we are persuaded by *Parklane Hosiery Company, Inc. v. Shore*, 439 U.S. 322 (1979), that the interests of the judicial system in the prudent use of its limited resources permit the doctrine of collateral estoppel to operate to preclude relitigation of these issues before the jury. Thus, we affirm the district court's grant of summary judgment to the defendant on the plaintiff's legal claims.

I.

Mount Saint Mary's College ("College") is the oldest independent Catholic institution of higher learning in the United States. Located in Emmitsburg, Maryland, it provides a liberal arts education to its students. Its faculty consists of both laymen and clergy.

The College employed Madeline Ritter, the appellant, as an assistant professor of education from September 1973 until June 1980. Mrs. Ritter is a Caucasian woman, at that time in her fifties. In addition to her teaching duties, Mrs. Ritter served as acting chairman of her department and developed elementary education courses. She received favorable evaluations from her students during the course of this employment.

Before 1977, tenure for faculty members at the College was easily attained after seven years service. In 1977, the Board of Trustees of the College appointed

---

1. *Ritter v. Mount Saint Mary's College*, No. 81-1534 (4th Cir. June 8, 1984) held that the EPA and ADEA actions did not present a significant risk of infringement upon the First Amendment rights of Mount Saint Mary's College.

Robert J. Wickenheiser as President and instructed him to establish a standard of academic excellence. He was directed to upgrade the quality of the College's faculty by the imposition of a new tenure policy. The College's new policy held that tenure "is not automatic, but the result of demonstrated excellence as a teacher and scholar." In particular, the handbook specifies that a tenure applicant should demonstrate "continued scholarly growth and commitment." Whether a candidate possessed a terminal degree in his field (a Ph.D. or the highest degree granted in the particular academic discipline) was also listed as one of the relevant criteria in the tenure decision. Mrs. Ritter lacked a terminal degree and had never published, although she had apparently taken some graduate courses at the University of Maryland.

Mrs. Ritter became eligible for tenure consideration in 1978. As part of the new tenure process, Dr. Wickenheiser received evaluations and recommendations from academic department chairmen, the Faculty Affairs Committee, and the Dean of the College.

Several department chairmen criticized Mrs. Ritter's lack of scholarly achievement, citing her failure to publish articles or books in her field. They concluded that her prospects for scholarly growth were poor. The new chairman of the Education Department, John Popenfus, recommended that the College grant Mrs. Ritter tenure subject to several restrictive conditions not usually associated with a tenured college or university faculty member. He also rated Mrs. Ritter "poor" in several evaluation categories. The Faculty Affairs Committee also recommended that Mrs. Ritter receive tenure. Several members of that committee, however, testified that Dr. Wickenheiser's later decision to deny tenure was academically defensible and implied that their recommendation was prompted more by their sympathy for Mrs. Ritter (who had an ill husband) than by their respect for her scholarly attainment. Finally,

Dean John Campbell recommended that the College deny Mrs. Ritter's tenure application. He found that Mrs. Ritter lacked the academic preparation and accomplishments necessary to justify the granting of tenure.

After considering these evaluations, Dr. Wickenheiser concluded that Mrs. Ritter fell short of the requirement of demonstrated excellence in various academic categories, and "unequivocally judged Mrs. Ritter not to be qualified for tenure." Mrs. Ritter appealed the denial, but the Executive Committee of the College Board of Trustees upheld Dr. Wickenheiser's decision.

In 1980 Mrs. Ritter filed a complaint in the United States District Court for the District of Maryland. She alleged that the College had violated her rights as secured by Title VII of the Civil Rights Act of 1964, the Equal Pay Act of 1963, and the Age Discrimination in Employment Act.

The College filed a Motion to Dismiss which was treated by the district court as a Motion for Summary Judgment pursuant to Fed. R. Civ. P. 12(b)(6). On August 5, 1980, the district court granted the Motion to Dismiss the EPA and ADEA claims on the grounds that the Supreme Court's ruling in *NLRB v. Catholic Bishops of Chicago*, 440 U.S. 490 (1979), dictated that the two acts did not apply to religious institutions such as the defendant college. The district court, however, denied the motion to dismiss the Title VII claim. In light of the dismissal of the EPA and ADEA claims, the College filed a motion to strike the plaintiff's jury trial demand, which motion was unopposed.[2]

---

2. This court disagrees with the appellee's argument that the appellant's failure to oppose the motion to strike the demand for a jury trial constituted a waiver of that right for the purposes of the legal claims later remanded. Once the District Court had dismissed the plaintiff's ADEA and EPA claims, the plaintiff no longer had a right to a jury trial. Therefore, it would seem odd to require the plaintiff to assert, upon penalty of waiver, a right which she no longer had.

The district court, sitting as the fact finder, conducted the trial of Mrs. Ritter's Title VII claim. The trial consisted primarily of an attack upon the qualifications of John Popenfus, who was granted tenure by the College in 1979. The district found that (1) Mrs. Ritter was not qualified for tenure at the College, and (2) Dr. Popenfus was clearly more qualified than the plaintiff. The court thus awarded judgment for the College with costs.

The plaintiff and defendant thereupon filed cross-appeals to this court. Mrs. Ritter appealed the dismissal of her EPA and ADEA claims as well as the denial of her Title VII tenure claim. On June 8, 1984, this court reversed the district court's decision that the provisions of the EPA and the ADEA do not apply to a church-sponsored college, and remanded these claims for "further consideration." This court affirmed the judgment against Mrs. Ritter on the Title VII claim. Specifically, this court declined to disturb the district court's factual finding that Mrs. Ritter was not qualified for tenure. This court also affirmed the district court's denial of the College's request for its attorney's fees.

After remand, the College petitioned the district court for summary judgment on the EPA and ADEA claims. The college argued that, because the ADEA and EPA claims had common elements with the Title VII claim, the issues determined by the court in the Title VII claim collaterally estopped the relitigation of those issues before a jury.

Recognizing that the issues involved were identical, the plaintiff filed, under Fed. R. Civ. P. 60(b)(5), a motion to vacate the judgment on the Title VII claim, in order to permit the jury to find the facts free of the court's judgment. On September 3, 1985, the district court found that it lacked authority to vacate this court's Title VII affirmance, and consequently denied the plaintiff's motion. The district court then found that the factual findings reached in the Title VII suit collaterally

estopped the plaintiff from establishing a prima facie ADEA claim, because the two causes of action contained the identical element: that the plaintiff must demonstrate that she was qualified for tenure at the College. The motion on the EPA claim was denied without prejudice to permit the plaintiff to conduct further discovery. The district court informed Mrs. Ritter, regarding her EPA claim, that she "must show comparisons with individuals *other than* John Popenfus, a person the court has already ruled more qualified than the plaintiff during the relevant time period." On November 1, 1985, Mrs. Ritter submitted her memorandum on the EPA claim, again identifying John Popenfus as her "only valid job comparator." The district court then granted the College's Motion for Summary Judgment on the EPA claim.

On December 5, 1985 the College filed a bill of costs in the district court, which bill was reduced by the clerk of the court. Mrs. Ritter filed a motion to review the taxation of costs, which the district court denied.

Mrs. Ritter appeals the district court's denial of her motion to vacate the Title VII judgment, and its refusal to allow the ADEA and EPA claims to be tried before a jury. She also appeals the award of costs.

II.

Had the district court not erroneously dismissed the appellant's legal claims, a jury, and not the court, would have determined the facts arising out of Mrs. Ritter's denial of tenure. *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500 (1959) and *Dairy Queen, Inc. v. Wood*, 369 U.S. 469 (1962), stand for the proposition that, where legal and equitable claims are contained in the same set of facts, the right to a jury trial, which the legal claims permit, should predominate, precluding the prior determination of the factual issues by a court sitting in equity. A trial court should, whenever possible, preserve the

right to a jury trial, and "only under the most imperative circumstances . . . can the right to a jury trial of legal issues be lost through the prior determination of equitable claims." *Beacon Theatres* at 510-11.

The broad principle set forth in *Beacon Theatres* and *Dairy Queen* has been delimited by later Supreme Court decisions. In *Katchen v. Landy*, 382 U.S. 323 (1966), and *Parklane Hosiery Company, Inc. v. Shore*, 439 U.S. 322 (1979), the Supreme Court permitted findings of fact found by a court in equity to preclude later jury determinations of those same facts. In *Katchen*, the court permitted a Bankruptcy Judge to decide both equitable and legal claims pursuant to the bankruptcy law's summary procedures. The court stated that, "[i]n neither *Beacon Theatre* nor *Dairy Queen* was there involved a specific statutory scheme contemplating the prompt trial of a disputed claim but without the intervention of a jury." *Id.* at 339. In *Parklane* the court permitted the offensive use of collateral estoppel to prevent the relitigation before a jury of facts found in an equity case. The court noted that at common law a litigant "was not entitled to have a jury determine issues that had been previously adjudicated by a chancellor in equity." *Parklane*, 439 U.S. at 333. The court stated that *Beacon Theatres* was "no more than a general prudential rule." Thus, "an equitable determination can have collateral-estoppel effect in a subsequent legal action and . . . this estoppel does not violate the Seventh Amendment." *Id.* at 335.

The appellant has cited decisions of lower federal courts which, contrary to the rule enunciated in *Parklane*, have held that a prior equitable determination cannot collaterally estop the relitigation of the same issues in a later jury trial. *See Bouchet v. National Urban League, Inc.*, 730 F.2d 799 (D.C. Cir. 1984); *Calnetics Corp. v. Volkwagen of America, Inc.*, 532 F.2d 674 (9th Cir.), *cert. denied*, 429 U.S. 940 (1976); *Heyman v. Kline*, 456 F.2d 123 (2nd Cir.), *cert. denied*, 409 U.S.

847 (1972). These cases pre-date *Parklane*, with the exception of *Bouchet*, in which the proposition that the use of equitable findings to estop collateral relitigation before a jury violates the party's right to a jury trial is made in dicta, the case decided on jurisdictional grounds. The *Bouchet* proposition is, moreover, set forth without reference to *Parklane*, despite the clear relevance of that case to the issue presented. We find these lower court opinions unpersuasive in light of the rule established in *Parklane*.

The litigants have each based much of their arguments on the "policies" underlying the estoppel doctrine, and the case does present the interesting issue of the conflict between the interests of the judicial system in a speedy and economical resolution of litigation versus the apparently unfair penalization of the appellant in denying her a jury trial because the trial judge erred in striking her legal claims. This court need not involve itself in the laborious and inconclusive policy analysis suggested by the parties on this issue, however, because the Supreme Court has already undertaken this policy analysis for us. *Parklane* decided that the judicial interest in the economical resolution of cases, which interest underlies the doctrine of collateral estoppel, does override the interest of the plaintiff in re-trying before a jury the facts of a case determined by a court sitting in equity.

The fact that the judge in this case was in error in dismissing the legal claims, whereas in *Parklane* the estoppel arose from a prior, separate suit, is irrelevant. The effect of the error, just like the "effect" of the prior suit in *Parklane*, is the same: Issues on which the plaintiff had a right to jury determination were tried to the court. What the appellant in this case is in reality concerned about is not the error of the district court, which was rectified, but rather the "harm" of the denial of a jury trial, which resulted from that error. The Supreme Court has already decided that the harm

complained of is insufficient to override the judicial interest in the speedy resolution of disputes. If the rule were otherwise, then each time a legal claim is dismissed, this court would hear an interlocutory appeal that would in essence involve the merits of the claim, even though a record had not been developed before a fact finder. In the alternative, the litigants would conduct a trial to the bench, with the full knowledge that all could go for naught if any of the legal claims were reversed and a jury were entitled to determine the same facts on a clean slate. In this latter instance, the incentives of the litigants to litigate effectively would be diminished; moreover, needless time and expense would be undertaken. Thus the better rule, as enunciated in *Parklane,* is for the judge-determined issues to stand as the facts of the case. One trial of common facts is enough.

The appellant also argues that, because collateral estoppel is "collateral," it should only serve to preclude the relitigation of issues determined in a *prior* suit, and because the issue presented in this case involves the use of estoppel within the same suit, the doctrine of collateral estoppel should not apply.

It is indeed true that the doctrine of collateral estoppel was designed to bar the relitigation of issues determined in a prior suit. The "prior suit" notion merely reflects, however, the usual circumstance under which the issue of whether to apply collateral estoppel arises. The prior suit "requirement" protects no interests that are relevant to this suit.[3]

---

3. The only condition that such a "requirement" might be thought to ensure is that the prior determinaton of fact was before a court of sufficient authority to bind the court in a later suit. If, for example, the prior suit had been merely an administrative proceeding, then collateral estoppel arguably might not in some circumstances prevent the relitigation of the same issues before a common law court. This interest in ensuring the competency and authority of the court deciding the "prior suit" is not a stake in this litigation:

The limitations on the use of collateral estoppel prevent the use of the doctrine against persons who either were not a party to the former suit, or did not have their interests substantially protected therein. Although there has been a marked departure from this "mutuality" requirement traditionally limiting the use of collateral estoppel, the departure has been conducted with a great degree of caution in light of the inherent danger in binding persons by judgments to which they were not a party. In this case, no factors warranting caution are present. This "second" suit involves the same parties, the same issues arising out of the same set of facts, and the same court. It is this "sameness" or mutuality of parties in interest which serves as the basis for the development of collateral estoppel doctrines. This case is not the extension of collateral estoppel to uncharted areas beyond mutuality, but rather stands as the classic case in which the court can utilize the doctrine of collateral estoppel without fear of denying a litigant a right to argue his claims to the best of his ability before a competent court. It would be absurd to say that the requirement of a "prior suit" means that the facts found in a single case cannot bind the parties in the same case. Indeed, if the parties were not bound by the facts found in the very same case which they were litigating, then the judgments of courts issued during trial would become irrelevancies.

We have decided that the facts determined in the Title VII trial can have preclusive effect on the legal claims[4], and we must now determine whether the facts

---

NOTES *(Continued)*

indeed, the "prior court" is the same court before which the plaintiff asks for relitigation.

4. Because the doctine of collateral estoppel precludes the relitigation of the facts found in the Title VII suit, the district court was correct in finding that it had no grounds for vacation under Rule 60(b)(5).

found in the Title VII trial are dispositive of the ADEA and EPA theories so as to warrant summary judgment.

A. The ADEA Claim

This court has "borrowed the principles" enunciated in the Title VII case of *McDonnell Douglas Corporation v. Green*, 411 U.S. 792 (1973) for resolution of ADEA cases. *Smith v. University of North Carolina*, 632 F.2d 316, 332 (4th Cir. 1980). According to *McDonnell Douglas*, plaintiff has first to prove a prima facie case consisting of four elements: (1) she is a member of a protected class (age and sex); (2) she was qualified for tenure; (3) despite her qualifications, she was rejected; and (4) after her rejection the position remained open and the defendant continued to seek or accept applications from persons of her qualifications. *Lieberman v. Gant*, 630 F.2d 60, 63 (2nd Cir. 1980). The district court, in its trial on the Title VII claim, found that Mrs. Ritter was not qualified for tenure and that her replacement (Popenfus) was more qualified than Mrs. Ritter. The Court of Appeals affirmed the district court's denial of Mrs. Ritter's Title VII claim on the grounds that the district court did not clearly err in finding Mrs. Ritter to be not qualified for tenure.

The plaintiff in a ADEA action must show that he was qualified for the job. *Smith, supra*, at 332. Because we have determined that the findings of the district court in the Title VII cause of action can estop the relitigation of those issues under the ADEA cause of action, then Mrs. Ritter is bound by the court's finding that she was not qualified for tenure. Therefore, she cannot establish a prima facie ADEA case. We affirm the district court's grant of summary judgment on the ADEA claim.

Appellant also argues that she was denied an opportunity to litigate her various other claims for relief under the ADEA, including systemic age discrimination and

disparate treatment, because of the district court's erroneous dismissal of her legal theories under *Catholic Bishops*. In order to raise an ADEA claim in federal court, however, a claimant must first resort to appropriate state administrative proceedings. *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 753 (1979). In this case, appellant's complaint to the Equal Employment Opportunity Commission of Maryland clearly alleged only a denial of tenure claim. Thus, Mrs. Ritter has not met the jurisdictional prerequisite to arguing these other theories in federal court.

B. The EPA Claim

Section 206(d)(1) of the Equal Pay Act provides, in part:

> (d)(1) No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, *except* where such payment is made pursuant to . . . (iv) a differential based on any other factor other than sex . . . (emphasis supplied).

Once the plaintiff satisfies his burden of establishing a prima facie case, the burden shifts to the employer to prove, by a preponderance of the evidence, that the pay differential is justified by one of the express statutory exemptions, including a "factor other than sex." *See Corning Glass Works v. Brennan*, 417 U.S. 188, 196 (1974); *Hodgson v. Fairmont Supply Company*, 454 F.2d 490, 497 (4th Cir. 1972).

A difference in qualifications between the plaintiff and the "job comparator," the person or persons to whom the plaintiff chooses to compare her job status, salary, etc. for the purposes of establishing liability on an EPA claim, can constitute a "factor other than sex." *See e.g., Equal Employment Opportunity Commission v. Aetna Insurance Company*, 616 F.2d 719, 722 (4th Cir. 1980). The district court has already determined, in the Title VII element of the action, that Popenfus is "clearly more qualified" for tenure than is Mrs. Ritter. Thus, if that determination is allowed to have collateral estoppel effect, then the disparity in salary between Popenfus and Mrs. Ritter is attributable to a factor other than sex. Assuming that Mrs. Ritter proposed no job comparator other than Popenfus, the College would be entitled to summary judgment.

The question of whether the district court's finding that Popenfus and Mrs. Ritter were not of equal qualifications should serve to estop the appellant from establishing a *prima facie* case under the EPA theory is not easily resolvable. A corollary to the general rule of collateral estoppel is that, where the court in the prior suit has determined two issues, either of which could independently support the result, then neither determination is considered essential to the judgment. Thus, collateral estoppel will not obtain as to either determination. 4 Wright, *Law of Federal Courts* § 100A (1983). If one of the two determinations is upheld on appeal, however, collateral estoppel can obtain as to that issue.

The district court in this case made two determinations in resolving Mrs. Ritter's Title VII claim. This court affirmed that decision specifically on the grounds that one of the determinations, the fact that Mrs. Ritter was not qualified for tenure, was not clearly erroneous. Therefore, one might argue that the district court's other finding, that Popenfus was clearly more qualified for tenure than Mrs. Ritter, should not be granted collateral estoppel effect to bar trial before a jury of the EPA claim.

The rationale underlying this corollary to the collateral estoppel doctrine is that it guards against the use of non-essential dicta and ancillary findings to estop later litigations. The collateral estoppel doctrine seeks to further the judicial interest in economical resolution of disputes, although never to the point where a litigant is denied his full and fair opportunity to present his case to a competent fact finder. Non-essential findings should not serve as the basis for collateral estoppel because the litigants might not have concentrated their energies and resources upon the full development and presentation of these issues. Thus, like the "prior suit" requirement, this requirement ensures the integrity and competence of any particular finding before it is allowed to estop collateral relitigation.

The interest of the appellant in a full and fair opportunity to present her side of the case has been protected. Mrs. Ritter conducted extensive discovery of the job statuses and salaries of her colleagues,[5] and she presented a vigorous argument to the trial court in the Title VII suit. The district court stated that the element of the Title VII suit concerning the qualifications of the plaintiff's replacement "consisted entirely of an attack upon the qualifications of John Popenfus." Moreover, the same district court which heard the Title VII case also granted the College summary judgment on the EPA claim, thus providing the appellant with even a greater degree of certainty that the court was not granting collateral estoppel effect to any fact which was given less than full hearing before the trial court.

The collateral estoppel doctrine is a judge-made rule, capable of flexible interpretation to serve the interests of judicial economy by preventing needless relitigation. This flexibility is constantly limited by the overriding principle that the courts should protect a litigant's

---

5. Indeed, it appears that the College simply turned over the key to its documentary and administrative files to the plaintiff.

right to a full and fair opportunity to litigate his claims. As a result, extension of the doctrine of collateral estoppel to situations not involving the identical parties to the prior suit has rightly been undertaken with great caution.

Such circumstances warranting caution are simply not present here. This case features, in comparison to the "prior" suit, the same parties, the same issues, the same facts, and even the same court. Moreover, it is obvious on th record that the appellant has had a full and fair opportunity to litigate the qualifications of Popenfus, her proposed job comparator. To decide that collateral estoppel should not obtain with regard to this finding of fact simply because this court, in its prior decision on this suit, specifically mentioned only one element of the Title VII claim in its affirmance of the lower court would constitute an abandonment of serious judicial reasoning and decision-making in exchange for the wooden application of judge-made rules designed to protect litigants in circumstances where they need protection. We therefore affirm the decision of the District Court to grant the College summary judgment on the EPA claim. We also affirm the District Court's award of costs.

AFFIRMED.

COURT OF APPEALS' ORDER DENYING PLAINTIFF'S PETITION FOR REHEARING
May 28, 1987

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 86-3015

MADELINE RITTER,

Appellant,

v.

MOUNT ST. MARY'S COLLEGE,

Appellee.

On Petition for Rehearing

O R D E R

Upon consideration of the appellant's petition for rehearing,

IT IS ORDERED that the petition for rehearing is denied.

Entered at the direction of Judge Chapman with the concurrence Judge Ervin and Judge Wilkins.

For the Court,
JOHN M. GREACEN
Clerk

OPINION OF DISTRICT COURT
September 3, 1985

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil Action No. N 80-632

MADELINE RITTER

v.

MOUNT ST. MARY'S COLLEGE

MEMORANDUM

Currently pending is a motion for summary judgment filed by defendant, Mount Saint Mary's College ("the College") and a motion to vacate judgment filed by plaintiff, Madeline Ritter. (Papers 87 and 92, respectively). The parties have briefed their motions fully and the Court has heard oral argument. For the reasons set forth hereinbelow, plaintiff's motion will be denied and the College's motion will be denied in part and granted in part.

I.

A brief review of the procedural history of this case is essential to put the instant motions into context. On March 17, 1980, Ms. Ritter filed a complaint in this Court alleging that the College had violated her rights as secured by Title VII, 42 U.S.C. §2000(e) *et seq.* ("Title VII"), the Equal Pay Act of 1963, 29 U.S.C. §206(d) ("EPA"), and the Age Discrimination in Employment Act, 29 U.S.C. §621 *et seq.* ("ADEA"). Plaintiff made a timely demand for a jury trial under Rule 38(b), FED. R.CIV.P. She was entitled to a jury trial for the EPA and the ADEA claims.

On August 8, 1980, this Court, relying on *NLRB v. Catholic Bishops of Chicago*, 440 U.S. 490 (1979),

dismissed the EPA and ADEA claims on the grounds that these two acts did not apply to religious institutions such as the College. In light of the dismissal of these claims, the College sought, and this Court granted, an Order striking plaintiff's jury trial request.

Sitting as a trier of fact, this Court heard plaintiff's Title VII claim in April and May, 1981. In a Memorandum Opinion dated May 27, 1981, the Court found that Ms. Ritter was not qualified for tenure and granted judgment in favor of the College on the Title VII claim. In addressing Ms. Ritter's qualifications for tenure, this Court stated:

> The education department needed excellent people with detailed knowledge of specific areas such as elementary education not an average generalist. President Wickenheiser's testimony covered all of this same ground and articulately reinforced the fact that Ms. Ritter was not denied tenure because she is a woman. Rather, she was denied tenure because she was not a scholar. Ms. Ritter may well have been a more than adequate teacher, but the College wanted scholars for teachers. Ms. Ritter is not a scholar. She is therefore not qualified for tenure. The verdict of this court must be for the defendant.

Ritter v. Mount St. Mary's College, N 80-632, slip op. at p. 6 (D.Md., filed May 27, 1981).

Thereafter, Ms. Ritter appealed this judgment and the earlier dismissal of the EPA and ADEA claims to the United States Court of Appeals for the Fourth Circuit. The Fourth Circuit affirmed the judgment against Ms. Ritter on the Title VII claim but reversed the finding that the EPA and ADEA could not be applied to religious institutions such as the College. The case was then remanded to this Court "for further consideration." *Ritter v. Mount St. Mary's College*, No. 81-1534, slip op. at 8 (4th Cir., filed June 8, 1984).

Immediately after remand, the College filed a motion for summary judgment as to both remaining claims. With respect to the age discrimination claim, the College argues that under the principles of collateral estoppel, this Court's finding that Ms. Ritter was not qualified for tenure precludes her from making out a *prima facie* case under the ADEA, which also raises the issue of qualifications for tenure. As to the EPA claim, the College advances a set of interrogatories and suggests that based on its answers thereto, Ms. Ritter "cannot meet any objective probative test that she was discriminated against on the basis of pay while at the College." College's Memorandum in Support of Motion for Summary Judgment at p. 4.

Ms. Ritter opposes the College's motion for summary judgment arguing (1) that the Fourth Circuit would not have remanded this case on the ADEA claim if the factual determination regarding plaintiff's qualifications for tenure could preclude her from establishing a *prima facie* case; (2) that the doctrine of collateral estoppel is not applicable to this case given its unique factual and procedural posture; and (3) that acceptance of the College's collateral estoppel argument requires this Court to vacate its Title VII judgment rather than grant the College's motion. Ms. Ritter also challenges the College's interpretation of its own answers to interrogatories and asserts that material issues of fact remain with regard to the EPA claim.[1]

Subsequent to her opposition to the College's motion for summary judgment, Ms. Ritter moved to vacate this Court's Title VII judgment under Federal Rule of Civil Procedure 60(b)(5). In that motion, she argues that

---

1. Discovery on the EPA claim has been continued by letter Order of this Court dated September 3, 1985. A decision on this claim will be withheld pending review of plaintiff's proffer of her *prima facia* EPA claim. Accordingly, for purposes of this memorandum, the College's motion for summary judgment on this claim will be denied, without prejudice.

where the right to a jury trial has been erroneously denied, and the equitable claim has been tried by a judge, on remand, the judgment on the equitable claim must be vacated so that factual issues common to both the legal (EPA and ADEA) and equitable (Title VII) claims can be decided by a jury. The College opposes the motion to vacate arguing that it is too late; that this Court is without authority to grant the motion; and that FED.R.CIV.P. 60(b)(5) does not apply in this instance.

II.

A. *COLLATERAL ESTOPPEL*

The doctrine of collateral estoppel prevents a party from relitigating an issue or fact once that issue or fact has been conclusively determined. 1B J. Moore, *Moore's Federal Practice*, ¶ p.441[2] (2d ed. 1984). The doctrine serves the dual purpose of advancing judicial economy and protecting litigants from the burden of relitigating identical issues or facts. *Parklane Hosiery Company, Inc. v. Shore*, 439 U.S. 322, 326 (1979); *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313, 328 (1971).

In this case Ms. Ritter's ADEA claim is based on the same facts and circumstances as her Title VII claim. To establish a *prima facie* ADEA claim, she would have to establish as one of her elements of proof, that she was qualified for tenure at the College. *See Smith v. University of North Carolina*, 632 F.2d 316, 332 (4th Cir. 1980) (recognizing that the elements of an ADEA claim are identical to those elements of a Title VII claim, including a requirement that plaintiff be qualified for the position sought). But this Court has already found that Ms. Ritter was *not* qualified for tenure at the College and that factual finding was affirmed by the Fourth Circuit. Once that fact has been judicially determined, Ms. Ritter is collaterally estopped from litigating it again. *Parklane Hosiery Company, Inc., supra*. Because she is

precluded from relitigating the qualification for tenure issue, the Court concludes that, as a matter of law, plaintiff cannot establish the necessary elements to make out a *prima facie* ADEA case.

The major thrust of plaintiff's opposition to the College's motion for summary judgment and its corresponding reliance on the doctrine of collateral estoppel is her argument that the wrong trier of fact — the judge, rather than the jury — has decided the disputed fact. Had this Court not erroneously dismissed the EPA and ADEA claims, she argues, the jury would have heard her case and a judicial determination of the Title VII claim would have followed the jury's determination. Ms. Ritter essentially argues that application of collateral estoppel deprives her of her right to a jury. This argument is premised on a line of Supreme Court cases beginning with *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500 (1959) and *Dairy Queen, Inc. v. Wood*, 369 U.S. 469 (1962), that hold where legal (ADEA) and equitable (Title (VII) claims are presented in a single case, the legal ones should be tried first so as to preserve the right to a jury trial.

In *Katchen v. Landy*, 382 U.S. 323 (1966), the Supreme Court addressed a similar argument in the context of a bankruptcy court ruling. In that case, the defendant argued that if a bankruptcy judge's findings of fact were given collateral estoppel effect, and the same facts were involved in a subsequent jury trial, this would deny him the right to a jury trial under the Seventh Amendment, citing *Beacon Theatres* and *Dairy Queen*, both *supra*. The Supreme Court rejected this argument and stated:

> Both *Beacon Theatres* and *Dairy Queen* recognize that there might be situations in which the Court could proceed to resolve the equitable claim first *even though the results might be dispositive of the issues involved in the legal claim.*

Katchen v. Landy, 382 U.S. at 339-340 (emphasis added).

Similarly, in *Parklane Hosiery Company, Inc. v. Shore*, 439 U.S. 332 (1979), one of the issues addressed was the effect of collateral estoppel on a party's Seventh Amendment right to a jury trial. There, the Supreme Court held that *Beacon Theatres* and *Dairy Queen* "enunciated no more than a general prudential rule," and that "an equitable determination can have collateral estoppel effect in a subsequent legal action and that estoppel does not violate the Seventh Amendment." *Id.*, at 334-335. Justice Stewart's explanation is directly applicable to the case at bar:

> A litigant who has lost because of adverse factual findings in an equity action is equally deprived of a jury trial whether he is estopped from relitigating the factual issues against the same party or a new party. *In either case, the party against whom estoppel is asserted has litigated questions of fact, and has had the facts determined against him in an earlier proceeding. In either case there is no further fact finding function for the jury to perform, since the common factual issues have been resolved in the previous action.*

Id., at 335-336 (emphasis added).

In this case a question of fact, Ms. Ritter's qualifications for tenure, has been litigated fully and fairly in the Title VII proceeding. Collateral estoppel prevents Ms. Ritter from litigating that same fact once again before a jury. As the Supreme Court stated, "there is no further fact finding function for the jury to perform since the common factual issues have been resolved in the previous action." *Id.*

B. *VACATE JUDGMENT OR GRANT SUMMARY JUDGMENT*

Apparently recognizing the lethal effect collateral estoppel has on her ADEA claim, Ms. Ritter urges this Court not to grant summary judgment in favor of the College, but rather to vacate the judgment against her in the Title VII claim so the entire case can be heard *de novo* before a jury. In support of her position, Ms. Ritter cites *Bouchet v. The National Urban League*, 730 F.2d 799 (D.C. Cir. 1984); *Calnetics Corp. v. Volkswagen of America, Inc.*, 532 F.2d 674 (9th Cir.), *cert. denied*, 429 U.S. 940 (1976); and *Heyman v. Kline*, 456 F.2d 123 (2d Cir.), *cert. denied*, 409 U.S. 847 (1972).

In *Bouchet, supra*, the Court of Appeals for the District of Columbia was concerned with the effect of a judgment on a Title VII claim if the appellate court were to determine that the district court improperly denied plaintiff the right to a jury on her pendent state tort claims. In dicta, the Court of Appeals observed that if the lower court had erred in striking the jury request, "not only would a jury trial on her tort claims be required, but the Title VII judgment — even if otherwise valid — would have to be vacated, and the whole case retried, giving preclusive effect to all findings of fact by the jury." *Id.*, 730 F.2d at 803-804.

Similarly, in *Calnetics Corporation, supra*, where the district court erroneously denied plaintiff's right to a jury trial, the Ninth Circuit noted that a "[p]rior non-jury trial of the equitable claims may infringe the right to a jury trial on the legal claims because of the collateral estoppel or res judicata effect of a prior judicial determination of issues common to the two sets of claims." *Id.*, 532 F.2d at 690. To avoid the binding effect of collateral estoppel, the Ninth Circuit vacated the district court's judgment on the equitable claim and remanded the entire case for trial before a jury, noting that the jury's decision would control both the legal and equitable

claims. *Id.* This same conclusion was reached in *Heyman v. Kline, supra.* In that case, the trial court denied the defendant's demand for a jury trial and entered judgment in favor of the plaintiff on other legal and equitable claims. After concluding the trial court erred in denying defendant's request for a jury, the Second Circuit vacated judgment on the equitable claims so that the jury could decide all facts free of the effects of collateral estoppel. *Id.* 456 F.2d at 130-31.

The principle of these cases is clear: where the trial court erroneously denies a litigant its right to a jury trial and then proceeds to determine the equitable claim, on remand, the appellate court should vacate the ruling on the equitable claim so that the entire matter can be heard and determined by the appropriate trier of fact, the jury. While the principle of these cases may be clear, its application to the instant case by this Court is not so lucid. The distinguishing factor of all the decisions cited by Ms. Ritter is that in those cases, it was the *appellate court* that vacated the judgment, not the trial court after remand. Once the Fourth Circuit affirmed this Court's Title VII judgment, the final judgment on that claim became theirs and this Court simply has no authority to vacate the Fourth Circuit's superior Title VII judgment. *See* 1B J. Moore, *Moore's Federal Practice,* ¶0.404[10] (2d ed. 1984) (if a judgment is affirmed by an appellate court the district court may not disturb it on remand); *Stamper v. Baskerville,* 723 F.2d 1106, 1107 (4th Cir.), *cert. denied,* U.S. , (1984). Accordingly, this Court does not have the authority or jurisdiction to apply the principle of law espoused by *Bouchet, Calnetics,* and *Heyman.*

Contrary to Ms. Ritter's suggestions that the Fourth Circuit remanded this case with a mandate that plaintiff be allowed to proceed to trial on her ADEA claim, the remand in this case provided in full the following:

> In sum, *we affirm the District Court's judgment on the Title VII claims*, but reverse the dismissal of the EPA and ADEA claims and *and remand for further consideration*. (emphasis added).

There was no directive to try the ADEA claim. Furthermore, the Title VII claim was not remanded and is no longer before this Court. Since this Court lacks authority to vacate the Fourth Circuit's judgment, its hands are tied and Ms. Ritter's motion to vacate must be denied.[2] Because the motion to vacate cannot be granted, collateral estoppel principles dictate that the College's motion for summary judgment on the ADEA claim must be granted.

III.

In sum, the Court concludes that the factual findings reached in the Title VII suit collaterally estop Ms. Ritter from establishing a *prima facie* ADEA claim. Because this Court lacks authority to vacate the Fourth Circuit's Title VII judgment, summary judgment on the age discrimination claim must be granted. Ms. Ritter's motion to vacate judgment will be denied. The College's motion for summary judgment on the EPA claim will be denied, without prejudice.

A separate order confirming the within rulings will be entered.

Edward S. Northrop
Senior United States District Judge

Dated: September 3, 1985

2. This conclusion makes a decision on the College's alternative arguments in opposition to the motion to vacate unnecessary.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil Action No. N 80-632

MADELINE RITTER

v.

MOUNT ST. MARY'S COLLEGE

ORDER

In accordance with the foregoing Memorandum, and for the reasons stated therein, IT IS, this third day of September, 1985, by the United States District Court for the District of Maryland, ORDERED:

1. That the motion to vacate judgment filed by plaintiff, Madeline Ritter, BE, and the same hereby IS, DENIED;

2. That the motion for summary judgment filed by defendant, Mount Saint Mary's College, BE, and the same hereby IS, GRANTED as to plaintiff's claim under the Age Discrimination in Employment Act, 29 U.S.C. §621 *et seq.*, and DENIED, without prejudice, as to the claim under the Equal Pay Act, 29 U.S.C. §206(d) *et seq.*; and

3. That the Clerk of Court shall mail copies of this Order and of the foregoing Memorandum to counsel in this case.

Edward S. Northrop
Senior United States District Judge

OPINION OF DISTRICT COURT
November 19, 1985

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil Action No. N 80-632

MADELINE RITTER

v.

MOUNT ST. MARY'S COLLEGE

MEMORANDUM

On September 3, 1985, this Court ordered plaintiff Madeline Ritter to conduct a review of the records of defendant Mount St. Mary's College to determine with which employees she planned to compare herself for purposes of her Equal Pay Act (EPA) claim. Two months later and after extensive discovery, the plaintiff reports that the only valid job comparator she has found is Professor John Popenfus, the same John Popenfus whom this Court found "clearly more qualified" than the plaintiff in an opinion dated May 27, 1981. For this reason, the Court had directed that Popenfus not be considered as a job comparator for purposes of the Equal Pay Act claim.

Ms. Ritter now requests that the Court reconsider its earlier finding with respect to Mr. Popenfus' and her qualifications. Also pending is defendant Mount St. Mary's College's motion for summary judgment on the EPA claim.[1] No hearing is necessary for resolution of these motions. Local Rule 6. For the reasons set forth below, the plaintiff's motion for reconsideration is denied and summary judgment is granted in favor of the defendant.

---

1. That motion was previously denied without prejudice in an Order dated September 3, 1985.

A. *BACKGROUND*

The procedural history of this case was recently reviewed in this Court's Memorandum of September 3, 1985.

B. *THE COURT'S FINDINGS OF MAY, 1981*

In April and May of 1981, this Court presided over a five-day, non-jury trial on the plaintiff's Title VII (42 U.S.C. §2000(3), *et seq.*) claim. In an opinion dated May 27, 1981, the Court entered judgment for the defendant.

The trial followed the format established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). Under this format, the plaintiff must initially prove a *prima facie* case consisting of four elements.[2] The fourth element requires that "after her [the plaintiff's] rejection the position remained open and the defendant continued to seek or accept applications from *persons of her qualifications*." *Ritter v. Mount St. Mary's College*, Civil Action No. N 80-632, slip op. at 1 (D.Md. May 27, 1981) (emphasis added).

With regard to this element, the Court found that "John Popenfus was clearly more qualified than Ms. Ritter." (Court's opinion at 5). The evidence at trial established that: 1) Virginia Polytechnic Institute employed Mr. Popenfus as a highly regarded adjunct professor in its graduate studies program. Ms. Ritter never taught at the graduate level; 2) Catholic University employed Mr. Popenfus as a Ph.D. thesis advisor; 3) Mr. Popenfus published several scholarly articles and a book. Ms. Ritter never published; and 4) the Education Department of the College substantially improved under Mr. Popenfus' leadership.[3]

---

2. If the plaintiff succeeds in proving the *prima facie* case, the offer of proof proceeds according to the formula set out in *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 254-56 (1981).

3. Salary policies and procedures are set forth formally by the College. The Handbook of the Administration and Faculty of Mount Saint Mary's College, in effect since November, 1977, provides at

C. *THE EQUAL PAY ACT CLAIM*

Section 206(d)(1) of the Equal Pay Act provides:

> (d)(1) No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the ratge at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) *a differential based on any other factor other than sex: Provided*, That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee. (Emphasis added).[4]

To establish a *prima facie* case, a plaintiff must prove that an employer is paying different wages to employees of the opposite sex for equal work. If the plaintiff establishes a *prima facie* case, the burden shifts to the employer-defendant to prove, by a preponderance

---

page 39 that:

> All faculty salaries will be reviewed annually, taking into consideration performance, evaluation, experience, increase in cost of living and budgetary considerations.

(Exhibit 11 to defendant's Memorandum in Reply to Plaintiff's Opposition to Motion for Summary Judgment). College president Dr. Wickenheiser detailed the factors considered in salary determinations in his affidavit, attached as Exhibit 10 to defendant's same memorandum.

4. 29 U.S.C. §206(d)(1).

of the evidence, that the pay differential is justified by one of the four statutory exemptions. *EEOC v. Aetna*, 616 F.2d 719, 724 (4th Cir. 1980). *See Corning Glass Works v. Brennan*, 417 U.S. 188, 196, 94 S.Ct. 2223, 2229 (1974).

Even where individuals hold substantially equal jobs, differentials in salary are permitted under the Act when they are based on any factor other than sex. 29 U.S.C. §206(d)(1)(iv). *EEOC v. Aetna*, 616 F.2d at 725; *EEOC v. Cleveland State University*, 28 FED Cases 1782, 29 Emp. Prac. Dec. ¶32,783 (N.D. Ohio 1982).

Ms. Ritter does not so much challenge the validity of the earlier findings, as their applicability to the Equal Pay Act: "None of these [May, 1981] findings are relevant to the issue of the skills Professor Popenfus needed in the years 1978 through 1980 to teach undergraduate education students at Mount Saint Mary's College." (Plaintiff's Memorandum at 8-9). But Ms. Ritter's argument is misguided. Though the issue of qualifications may not directly relate to the *prima facie* EPA claim, it is dispositive as to the affirmative defense under 29 U.S.C. §206(d)(1)(iv). With Ms. Ritter's claim limited to a comparison with John Popenfus, the Court's findings of fact in May, 1981 concerning Mr. Popenfus' qualifications provide the College an affirmative defense under 29 U.S.C. §206(d)(1)(iv).

The plaintiff's challenge to the earlier findings of fact is limited to three claims: 1) the two faculty members held substantially equal jobs; 2) Popenfus' reputed Ph.D. degree was not of any real worth; and 3) any improvement in the Education Department under Popenfus' chairmanship was the result of increased hiring alone. (Plaintiff's Memorandum at pp. 7-9). As to the first claim, it does not necessarily follow, logically or empirically, that two persons holding equal jobs (assuming that were the case here) are equally qualified. Surely the plaintiff does not mean to suggest that a Nobel prize-winning academician is no more qualified to hold

the position of University Professor than an individual one year out of graduate school. As to the second claim, it ignores the fact that this Court placed no weight on the disputed Ph.D. degree in arriving at its factual determinations at trial.

With regard to the Department's improvement, the plaintiff offers no persuasive reason why this Court should alter its finding of May, 1981.[5] No new evidence or facts have been proffered to the Court, no new affidavits submitted. The plaintiff has merely attached some College Catalogue excerpts and course records to her memorandum.

The Court rendered its findings of fact following a five-day trial in 1981. At that time, the Court totally immersed itself in the facts of the controversy. Extensive testimony was provided by College faculty members and officials, the Dean and Provost of Catholic University and Ms. Ritter, among others. Nearly one hundred and fifty documents were placed into evidence. Those conclusions of fact stand. Relitigation of this same issue would be only wasteful and redundant.

With Popenfus eliminated as a comparator under the Equal Pay Act, the plaintiff is left without a single faculty member with whom to compare herself. Her claim, therefore, must be dismissed, and summary judgment granted for defendant Mount St. Mary's College. FED.R.CIV.P. 56. After five years of litigation, one trial and one trip to the Court of Appeals, *Ritter v. Mount St. Mary's College*, Civil Action No. N 80-632, ends not with a bang, but a whimper.

---

5. Even if the Court were inclined to upset its earlier finding, such a reversal might well be barred in light of the Fourth Circuit's affirmation of this Court's decision in Ms. Ritter's Title VII claim. *See Ritter*, slip op. (D.Md. September 3, 1985).

A separate order will be entered confirming the rulings herein.

Edward S. Northrop
Senior United States Judge

Dated: November 19, 1985

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil Action No. N 80-632

MADELINE RITTER

v.

MOUNT ST. MARY'S COLLEGE

ORDER

In accordance with the foregoing Memorandum, and for the reasons set forth therein, IT IS, this 19th day of November, 1985, by the United States District Court for the District of Maryland, ORDERED:

1. That the plaintiff's request for reconsideration of this Court's finding that John Popenfus cannot be considered as a job comparator for purposes of the Equal Pay Act BE, and the same hereby IS, DENIED;

2. That the defendant's motion for summary judgment BE, and the same hereby IS, GRANTED;

3. That the Clerk of Court ENTER JUDGMENT in favor of the defendant and against the plaintiff in this case;

4. That the Clerk of Court enter this case as CLOSED on this Court's docket; and

5. That the Clerk of Court mail copies of this Order and the foregoing Memorandum to counsel for the parties in this case.

Edward S. Northrop
Senior United States District Judge

NOTICE OF JUDGMENT
April 2, 1987

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

April 2, 1987

TO: Dona S. Kahn, Esq.
Carol E. Tracy, Esq.
Neil J. Dilloff, Esq.
Jonathan D. Smith, Esq.

NOTICE OF JUDGMENT

Judgment was entered in Case No. 86-3015 this date.

The Court's opinion is enclosed.

Supreme Court, U.S.
FILED
SEP 18 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-309

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

MADELINE RITTER,

Petitioner,

v.

MOUNT SAINT MARY'S COLLEGE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

NEIL J. DILLOFF*
JONATHAN D. SMITH
PIPER & MARBURY
1100 Charles Center South
36 South Charles Street
Baltimore, Maryland 21201
(301) 539-2530

Attorneys for Mount Saint Mary's College, Respondent.

*Counsel of Record.

The Daily Record Co., Baltimore, MD 21202

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

QUESTIONS PRESENTED

1. Was the Court of Appeals correct in applying collateral estoppel to petitioner's age discrimination and equal pay claims so as to bar readjudication of the same legal issues before a jury?

2. Was the Court of Appeals correct in applying collateral estoppel to petitioner's Equal Pay Act claim after a full and fair hearing before the trial court on the qualifications of petitioner's proposed job comparator?

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
STATEMENT OF THE CASE	1
SUMMARY OF REASONS FOR DENYING THE PETITION	3
ARGUMENT:	
I. The Fourth Circuit's Decision Is Consonant With The Decisions Of This Court, Which Do Not Require Reconsideration	4
II. The Differences In The Results Reached By The Fourth And Seventh Circuits Are Based On Factual Dissimilarities And, As A Result, No Review By This Court Is Warranted	5
III. The District Court And The Court Of Appeals Correctly Applied Collateral Estoppel To Petitioner's Equal Pay Act Claim	8
CONCLUSION	9

PAGE

TABLE OF AUTHORITIES

Cases

Beacon Theatres, Inc. v. Westover, 359 U.S. 500 (1959) 4

Dairy Queen, Inc. v. Wood, 369 U.S. 469 (1961) 4

Hussein v. Oshkosh Motor Truck Co., 816 F.2d 348 (7th Cir. 1987) 5, 6, 7, 8

Katchen v. Landy, 382 U.S. 323 (1966) 3, 4, 6

Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979) 3, 4, 5, 6, 7

Richardson Greenshields Securities, Inc. v. Mui-Hin Lau, et al., No. 87-7057, slip op. (2d Cir. July 30, 1987) 5

Ritter v. Mount Saint Mary's College, 814 F.2d 986 (4th Cir. 1987) 4, 5, 6, 7, 8

Constitution

U.S. Const. amend. VII 5, 6

Statutes, Rules and Congressional Materials

28 U.S.C. § 1292(b) (1966) 2

29 U.S.C. § 206(d) (1978) 2, 5, 6, 8

29 U.S.C. § 621, *et seq.* (1985) 2, 5, 6, 8

42 U.S.C. § 2000e, *et seq.* (1981) 2, 5, 6, 7, 8

Fed. R. Civ. P. 39(c) 2

Fed. R. Civ. P. 54(b) 2

No. 87-309

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

MADELINE RITTER,

Petitioner,

v.

MOUNT SAINT MARY'S COLLEGE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Having been denied tenure because she lacked suitable qualifications, petitioner Madeline Ritter comes to this Court seeking to overrule the academic judgment of the Department Chairmen, President and Board of Trustees of Mount Saint Mary's College ("the College") and the factual and legal findings of the Maryland Commission on Human Relations, the United States District Court for the

District of Maryland (on two occasions) and the United States Court of Appeals for the Fourth Circuit (on two occasions).

Petitioner filed her action against the College on March 17, 1980. She was provided with unlimited discovery and complete access to the College's employment records. After her claims under the Age Discrimination in Employment Act ("ADEA") 29 U.S.C. 621, *et seq.*; and Equal Pay Act ("EPA") 29 U.S.C. § 206(d), were dismissed, the case proceeded with respect to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.* Mrs. Ritter sought no interlocutory appeal under 28 U.S.C. § 1292(b), no certification of the dismissals as a final judgment pursuant to Fed. R. Civ. P. 54(b), and proceeded to trial on the Title VII claim without requesting an advisory jury under Fed. R. Civ. P. 39(c).

The Title VII trial occurred in April and May, 1981. Petitioner's case consisted almost entirely of an attack upon the qualifications of John Popenfus, another faculty member. The District Court found in favor of the College on May 27, 1981, holding, among other things, that petitioner was not qualified for tenure and that John Popenfus was clearly more qualified than Mrs. Ritter.

Petitioner appealed to the United States Court of Appeals for the Fourth Circuit. The Court of Appeals affirmed the District Court as to the Title VII claim but reversed the dismissal of the EPA and ADEA claims and remanded them for further consideration. Petitioner requested a rehearing of the Fourth Circuit's decision but did not raise any issue with respect to an alleged deprivation of her right to a jury trial in her petition for rehearing. Her petition was denied.

After remand, the College again opened its faculty employment records to Mrs. Ritter. Through discovery, the

College sought to determine whether Mrs. Ritter would attempt to compare herself to anyone other than John Popenfus. The District Court cautioned Mrs. Ritter that she should seek other comparators if she wanted to pursue her claims. Despite this admonition and unlimited access to the College's files, petitioner again identified John Popenfus as her only comparator. Since the issue of the comparison of Mrs. Ritter and John Popenfus had been the subject of six years of litigation, a five-day trial on the merits and an appeal to the Fourth Circuit, the District Court granted summary judgment in favor of the College, holding, among other things, that collateral estoppel barred Mrs. Ritter from relitigating well-trodden ground. Petitioner appealed again to the Court of Appeals, which affirmed the District Court.

Petitioner now seeks to turn back the clock and undo four judicial opinions by having this Court place this case back into the posture it had on March 17, 1980. By this brief in opposition, the College seeks to demonstrate that this action, far from rising to constitutional significance, is nothing more than a garden variety tenure case brought by a dissatisfied faculty member.

SUMMARY OF REASONS FOR DENYING THE PETITION

This Court's decisions in *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979) and *Katchen v. Landy*, 382 U.S. 323 (1966) are dispositive of all issues raised by petitioner. As a result, the instant action poses no new or important issue warranting review by this Court. Additionally, the apparent conflict between the Fourth and Seventh Circuits is based on factual and procedural differences between the respective cases that raise no legitimate concerns for inconsistent adjudications in the future.

ARGUMENT

I.

THE FOURTH CIRCUIT'S DECISION IS CONSONANT WITH THE DECISIONS OF THIS COURT, WHICH DO NOT REQUIRE RECONSIDERATION.

Petitioner seeks to distinguish this Court's decisions in *Parklane* and *Katchen* because those cases are dispositive here. The Court of Appeals specifically relied on *Parklane* and declined to "involve itself in the laborious and inconclusive policy analysis suggested by the parties because the Supreme Court has already undertaken this policy analysis for us." *Ritter v. Mount Saint Mary's College*, 814 F.2d 986, 991 (4th Cir. 1987). Simply stated, *Parklane* and the opinion of the Court of Appeals both concluded that the "judicial interest in the economical resolution of cases, which interest underlies the doctrine of collateral estoppel, does override the interest of the plaintiff in retrying before a jury the facts of a case determined by a court sitting in equity." *Id.* The pragmatic considerations supporting this conclusion are set forth in both *Parklane* and in the Court of Appeals' decision. In fact, this case is of significantly less importance than *Parklane* because there is mutuality of estoppel here, while in *Parklane*, this Court extended the scope of collateral estoppel to situations where no mutuality of parties existed. Far from being an expansion of *Parklane*, the instant action falls easily within its scope.

Furthermore, the result below does no violence to the holdings of *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500 (1959) or *Dairy Queen, Inc. v. Wood*, 369 U.S. 469 (1961). As noted in *Parklane*, those cases set forth no more than a general prudential rule that parties and courts should strive to decide legal claims first where those claims are mixed with equitable ones in the same action. That rule has lost none of its vitality. In the rare case in which

equitable issues are fully and fairly tried first, however, the Seventh Amendment does not compel that expensive and time consuming litigation start anew on issues already resolved. As this Court said in *Parklane*, the application of collateral estoppel does not violate the Seventh Amendment where "there is no further fact-finding function for the jury to perform, since the common factual issues have been resolved in the previous action." *Id.* at 336. *See Richardson Greenshields Securities, Inc. v. Mui-Hin Lau, et al.*, No. 87-7057, slip op. at n.4 (2d Cir. July 30, 1987) (citing *Ritter* with favor).

When placed in proper context, Mrs. Ritter's participation in the Title VII trial and intention to accept the benefits of victory if she had prevailed belie the alleged "injury" from the failure to have a jury trial on the identical issues. By voluntarily participating in a non-jury trial on the merits of her Title VII claim and foregoing her other procedural alternatives, petitioner gambled and lost. Just as the College had asserted collateral estoppel defensively to preclude relitigation of already decided issues, petitioner likewise was poised to assert collateral estoppel offensively in her ADEA and EPA claims. As the Court of Appeals stated, "One trial of common facts is enough." *Ritter v. Mount Saint Mary's College*, 814 F.2d at 991.

II.

THE DIFFERENCES IN RESULTS REACHED BY THE FOURTH AND SEVENTH CIRCUITS ARE BASED ON FACTUAL DISSIMILARITIES AND, AS A RESULT, NO REVIEW BY THIS COURT IS WARRANTED.

The asserted conflict between *Ritter* and *Hussein v. Oshkosh Motor Truck Co.*, 816 F.2d 348 (7th Cir. 1987), is nothing more than a difference in results based on differences in the factual and legal postures of those cases. Both courts of appeal agree on the purpose and underpinnings of the doctrine of collateral estoppel. If any

differences exist between the courts, they are based on the question of whether the Seventh Amendment bars the application of collateral estoppel in cases like this. This Court already has decided this issue in *Parklane* and *Katchen* and need not revisit it.

Ritter and *Hussein* are alike in that both courts held that a judgment in a full and fair trial on the merits of a Title VII claim must be affirmed even where legal claims were dismissed before trial. The courts also agree that collateral estoppel is a judicially developed doctrine that should be applied where appropriate to relieve litigants and the courts of the cost and waste involved in multiple consideration of the same issues between the same parties. The courts diverge only because those policies called for different results when applied to different facts and circumstances.

In *Ritter*, petitioner had numerous opportunities to avoid the application of collateral estoppel but availed herself of none. She proceeded to trial on her Title VII claim rather than seek a method to have her jury claims heard first, a factor of importance to this Court in *Parklane*, 439 U.S. at 337, n.24. During her first appeal she had the opportunity to seek the prevention of the application of collateral estoppel by requesting reversal of the Title VII judgment based on the arguments she makes here. On remand, she had the opportunity for a jury trial on the merits of her ADEA and EPA claims if she chose to compare herself to someone other than John Popenfus. The facts underlying the Title VII, ADEA and EPA claims were not necessarily identical. Collateral estoppel barred her claims only because she challenged no employment or compensation decisions at the College other than those related to John Popenfus. Her failure to do so speaks more to the weakness of her claims and the tunnel-vision with which she viewed those claims than it does to the alleged evils of the Fourth Circuit's limited application of

collateral estoppel. In light of these facts, the Fourth Circuit found it fair to bar continued litigation.

In *Hussein*, however, a majority of the court found that application of collateral estoppel would unfairly bar the plaintiff from any further litigation. Unlike *Ritter*, the Seventh Circuit concluded that the underlying facts were the same for all of Hussein's claims. The Seventh Circuit was requested to invoke collateral estoppel in Hussein's first and only appeal. If it did so, Hussein would have been deprived of any opportunity to develop his legal claims and present them to a jury. Ritter had that opportunity, but simply failed to come forth with any new facts or different comparators that would permit her to continue.

Furthermore, *Ritter* and *Hussein* differ because there was an earlier valid and reviewed judgment in *Ritter*, but not in *Hussein*. The Fourth Circuit reviewed and affirmed the Title VII judgment in the first appeal and was not asked to vacate that judgment until the second appeal. If it had done so, it faced the prospect of a third round of judgments and appeals. *Hussein*, on the other hand, presented a situation where there was no earlier valid judgment. The Title VII judgment there was on review for the first time so the appellate court was not asked to vacate its earlier judgment. The Seventh Circuit used the lack of an earlier, valid judgment in its attempt to distinguish *Parklane*. *Hussein*, 816 F.2d at 356. That distinction is absent in the instant case.

Hussein, far from being a "red wagon" case, is a mixture of four separate opinions that raises the possibility of inconsistent adjudications — a danger that collateral estoppel is intended to avoid. In *Hussein*, the Title VII judgment in favor of the employer stood while the other claims were remanded for further proceedings and potentially different outcomes. That possibility was avoided in *Ritter*. A similarity between *Ritter* and

Hussein, however, is Senior Judge Eschbach's comment that "part of the plaintiff's problem was of his own making." *Hussein*, at p. 357. Petitioner's "problem" here was her failure to take an interlocutory appeal or object to the proceeding of the Title VII trial before the District Court's dismissal of her ADEA and EPA claims was heard by the Fourth Circuit. Instead, petitioner chose to litigate her Title VII claim in the hope that, if successful at trial and on appeal of her ADEA and EPA claims, she would have the benefit of offensive collateral estoppel (or alternatively, could have settled for a Title VII victory and not appealed at all). *Hussein* had no such options.

While it is true that petitioner, in the first instance, would have been entitled to a jury trial on her ADEA and EPA claims, the District Court's error in dismissing them resulted in no prejudice to her. As the Fourth Circuit held, this Court has ruled in *Parklane* that the "harm" of the denial of one's preferred trier of fact is "insufficient to override the judicial interest in the speedy resolution of disputes." *Ritter*, 814 F.2d at 991.

III.

THE DISTRICT COURT AND THE COURT OF APPEALS CORRECTLY APPLIED COLLATERAL ESTOPPEL TO PETITIONER'S EQUAL PAY ACT CLAIM.

Petitioner's final argument is that this Court should review this case because the Court of Appeals incorrectly applied collateral estoppel to her EPA claim. She contends that "the only issue decided by the district court in trial of the Title VII count was Professor Ritter's qualifications for tenure." (Pet. 15.) That is not so. The District Court found not only that petitioner was not qualified, but also that John Popenfus was "clearly more qualified" than she. (Pet. A-13, A-27.) Both issues were litigated with vigor in the District Court, causing the Fourth Circuit little difficulty with allowing collateral estoppel effect to each. *Ritter*, 814

F.2d at 993-994. The Court of Appeals was correct in its application of the doctrine. Accordingly, its decision does not merit review by this Court.

CONCLUSION

For the reasons stated, the petition for writ of certiorari should be denied.

Respectfully submitted,

NEIL J. DILLOFF*
JONATHAN D. SMITH
PIPER & MARBURY
1100 Charles Center South
36 South Charles Street
Baltimore, Maryland 21201
(301) 539-2530

Attorneys for Mount
Saint Mary's College,
Respondent.

Counsel of Record.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 18th day of September, 1987, three (3) copies of the Respondent's Brief in Opposition were mailed, postage prepaid, to:

Alison Pease, Esquire
Harris and Kahn
14th Floor
1600 Market Street
Philadelphia, Pennsylvania 19103

Neil J. Dilloff